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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/10/17

SPONSOR Rodella LAST UPDATED 2/15/17 HB 83/aHSIVC/aHJC

SHORT TITLE National Guard Employment Protection SB \_\_\_\_\_

ANALYST Rogers

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	NFI	NFI	NFI	NFI	NFI	NFI

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Military Affairs (DMA)

Responses Not Received From

State Personnel Office (SPO)

### SUMMARY

Synopsis of HJC Amendment

The House Judiciary Committee (HJC) amendments seek to extend the benefits of both the Servicemembers Civil Relief Act and the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) to members of the national guard in this state or any other state in the United States.

In a new section 1, the amendments extend the Servicemembers Civil Relief Act to any national guard member ordered to state active duty for a period of thirty or more consecutive state duty days or to any federally funded duty performed in an operational role for homeland security in accordance with federal law. The amendment strikes the requirement for 30 or more consecutive days of service to qualify for USERRA.

The HJC amendment to House Bill 83 strikes two House State Indian and Veterans' Affairs Committee (HSIVC) amendments:

1. The first HSIVC amendment added the following language in Section 1 of the bill: "after

having given advance written or verbal notice of an obligation or intention to serve in the armed forces of the United States, an organized reserve or the national guard of this state or any other state or territory of the United States uniformed services to the person's employer, unless notice is precluded by military necessity or is otherwise impossible or unreasonable."

2. The second HSIVC amendment in Section 1 of the bill struck "if an officer" and inserted in lieu thereof "and has not had a cumulative period of absence in excess of five years by reason of service in the armed forces of the United States, an organized reserve or the national guard of this state or any other state or territory of the United States uniformed services".

In the new section 2, on page 1, line 18, after the first comma, the amendment inserts the following language: "after having given advance written or verbal notice of an obligation or intention to serve in the armed forces of the United States, an organized reserve or the national guard of this state or any other state or territory of the United States uniformed services to the person's employer, unless notice is precluded by military necessity or is otherwise impossible or unreasonable,".

In the new section 2, on page 2, line 2, the amendment strikes "if an officer" and inserts in its place "has not had a cumulative period of absence in excess of five years by reason of service in the armed forces of the United States, an organized reserve or the national guard of this state or any other state or territory of the United States uniformed services".

Finally, the amendment inserts "and convalescence" after "hospitalization" on page 2, line 6 and strikes "one year" and inserts in lieu thereof "two years" on page 2, line 7.

#### Synopsis of HSIVC Amendment

The House State Indian and Veterans' Affairs Committee amendment to House Bill 83 seeks to amend 28-15-1 NMSA 1978 to better align it with the main requirements of the Uniformed Services Employment and Reemployment Rights Act (USERRA) (38 U.S.C. §§ 4301-4335).

#### Synopsis of Bill

The bill seeks to amend Section 28-15-1 NMSA 1978 to extend employment rights to persons who are members of the military active or reserve components (for example, Active Duty, Reserve or National Guard) outside of the State of New Mexico, but have civilian employment within the State of New Mexico.

DMA analysis states section 28-15-1 NMSA as written applies to persons who are members of the military active or reserve components within the State of New Mexico and have civilian employment within the State of New Mexico. The bill would amend 28-15-1 NMSA 1978 to allow a "private" right of action in state district court to such persons who may be called up to duty and then had their civilian employment effected by their service outside the State of New Mexico.

#### **FISCAL IMPLICATIONS**

There is no fiscal impact as a result of this bill.

## SIGNIFICANT ISSUES

In response to the HSIVC amendment, DMA explains 28-15-1 NMSA 1978, which was first enacted in 1941, provides for reemployment rights for military members, but is much broader with regard to reemployment rights than its federal equivalent, USERRA. Specifically, under USERRA, employees are required to give notice to their employers if circumstances allow notice, there is a 5 year cumulative time limit on being able to use USERRA, and an application for reemployment must be filed by the employee within certain time frames (*See* 38 U.S.C. § 4312(a)). Further, USERRA, in 38 U.S.C. § 4312(e)(2), allows for hospitalization “or convalescing” to extend the period for application by up to two years, whereas 28-15-1 NMSA 1978 only allows for a one year extension for hospitalization only.

DMA states “without this change, persons who are members of military active or reserve components outside the State of New Mexico have to rely on the Uniformed Services Employment and Re-employment Rights Act (USERRA) for relief when a person’s employment is effected by their service. USERRA allows for the types of relief afforded persons under 28-15-3, such as the order of a speedy hearing, appointing of a prosecutor to represent the person, and the waiving of any fees or court costs. However, unless the person is employed by the state, the person must file for relief in federal court. This bill would allow a person a private right of action to file in state district court as well.”

## TECHNICAL ISSUES

DMA suggests 20-4-7.1 NMSA 1978 should be added to this bill with another amendment to not only extend these rights to New Mexico residents who belong to a unit outside the state, but also to delete the provision in subsection B which would require 30 days or more of service. Military members should have employment, reemployment, and freedom from employment discrimination based on their military status even if they serve only one day in a State Active Duty status.

DMA offers the following analysis for the suggested change:

NMSA 28-15-1 was enacted in 1941 and amended only once since. USERRA in its current form, was enacted in 1997. NMSA 28-15-1 is specific to reemployment rights and carries a private right of action in NMSA 28-15-2. USERRA is broader and covers employment, reemployment, and protection from employment discrimination based on military status. In 2004, 20-4-7.1 was enacted and in section 20-4-7.1(B) extends USERRA rights to military members activated for a period of thirty (30) or more days. USERRA does not require a military member be in status thirty or more days and applies the moment the member is in a military status. However, USERRA does not apply to national guardsmen in a State Active Duty status where they are essentially employees of the state under the command and control of the Governor. State Active Duty is usually for response to state emergencies such as search and rescue and firefighting operations. NMSA 28-15-1 and 20-4-7.1 both try to extend reemployment rights, but only NMSA 20-4-7.1 extends all of the protections of USERRA.